

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2008-006185

11/26/2013

HON. ROGER E. BRODMAN

CLERK OF THE COURT
N. Nowak
Deputy

IN RE THE MATTER OF
SANDRA ANN GARCIA

SANDRA ANN GARCIA
312 CARLISLE CRT
JACKSONVILLE NC 28540

AND

BRANDON PILAR VASQUEZ

BRANDON PILAR VASQUEZ
1145 W. BASELINE RD.
APT. 1018
TEMPE AZ 85282

AG-CHILD SUPPORT-SOUTH
CENTRAL OFFICE
IV-D JUDICIAL ASSISTANT - CCC
TASC - PHOENIX

**UNDER ADVISEMENT RULING ON PETITION FOR LEGAL DECISION-MAKING
AND PARENTING TIME**

On November 25, 2013, this Court held an evidentiary hearing on the Petition for Paternity, Legal Decision-Making, Parenting Time and Child Support. The Court heard testimony from Respondent Brandon Vasquez (Father) and Petitioner Sandra Garcia (Mother). The Court also reviewed the report from the Parenting Conference.

I. Background

The parties have twins, age 5. There is a child support order but no order granting either

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party custody or parenting time. For some time, the parties had an informal agreement by which Father had parenting time every other weekend. Although Father now claims he has a good job, Father has not consistently paid child support and has a large arrearage. He now pays \$600 per month in child support.

Mother has an 11-month-old baby by another man who is in the Marines. Mother indicated that the Marine is her fiancé, and she moved with him to North Carolina when he was stationed there.

Mother decided to move the twins to North Carolina. Although there is a dispute over how and when Mother notified Father, Mother moved to North Carolina with the twins on May 29, 2013. The Court was provided with no written documentation that Mother provided Father with written notice. The Court finds that Mother did not provide written notice. In any event, Father filed his petition on June 3, 2013. He did not serve Mother until July.

Father asks for the Court to award joint legal decision-making to both parents. Father also asks the Court to order Mother to return the children to Arizona. The big dispute in this case is where the children are to have their primary residence. Father wants the children to live with him; Mother wants the children to live with her.

The Parenting Conference Provider recognized the difficulty presented in the instant case. Due to the distance between the parties, the children cannot have regular and consistent visitation with both parents. The Parenting Conference Provider recommended a practice by which one parent is designated as the residential parent during the school year, and the other parent is provided with parenting time on breaks and summer vacation.

II. Analysis

Relocation is typically governed by A.R.S. § 25 – 408. As noted in the temporary orders minute entry, however, it appears that the statute does not directly apply. Under Section A, the statute applies only “if by written agreement or court order both parents are entitled to joint legal decision-making or unsupervised parenting time. . .” In the instant case, there is no evidence of a written agreement or any court order. Thus, the Court finds that the burden shifting provisions of A.R.S. § 25 – 408(F) do not apply.

The Court has jurisdiction, and will make its decision based on the best interests of the children. In determining the children’s best interests, the Court will nevertheless analyze the factors under A.R.S. § 408.

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Mother alleges Father is a drug dealer and user. Father denies the allegation. In its temporary orders ruling, the Court ordered Father to undergo a hair follicle test and to drop random UAs until he had eight consecutive clean tests. Unfortunately, Father did not comply with the court order. He did not undergo a hair follicle test. He has not provided any UAs. Although Father claims he was unaware of the Court's order, the Court refuses to accept Father's explanation. The Minute Entry dated August 16, 2013, could not have been clearer. Although Father claims he was unaware of the drug testing requirement, Father is under an obligation to read the Court's minute entries. Since Father was aware of the Court's ruling on the temporary orders, he either neglected to test or willfully ignored the testing requirement. Under any scenario, the Court considers Father's failure to test as a positive result.

Mother testified that the children live with their half-siblings, are enrolled in school and are doing well. The Court finds that the best interests of the children will be best served by continuing their current living arrangement.

A. Legal Decision-Making

Father asks for joint legal decision-making. Mother did not challenge the request. For the reasons that follow, the Court believes that joint legal decision-making is in the children's best interest.

As an initial matter, neither side is requesting that the Court remove the other parent from the children's lives. Both parents agree that the children need contact with the other parent.

Under A.R.S. § 25 – 403 (A), the Court must analyze factors relating to legal decision-making. In the instant case, both parents have enjoyed a past relationship with the children. In the past, Mother has spent significantly more time with the children. Undisputed evidence indicated that Father had exercised parenting time every other weekend pursuant to an informal agreement between the parties. Both parents have family members with whom the children interact. At Mother's home, the children interact with their half siblings. Father indicated that the children have a good relationship with their paternal grandmother. Father testified that his mother would assist him with daycare.

The children seem to have adjusted well in their new home and surroundings. Of course, the children were doing well before Mother moved to North Carolina.

The children are only five, and are not old enough to have wishes as to legal decision-

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making and parenting time. Both parents appear to be in good mental and physical health. No evidence was presented that either parent has mental or physical health issues.

One factor the Court is to consider is “which parent is more likely to allow frequent and meaningful continuing contact with the other parent.” With regard to this factor, the Court finds that Mother unilaterally decided to move the children to North Carolina. The Court does not believe that Mother provided Father with sufficient or appropriate notice under the circumstances. The Court notes that Mother has two other cases in family court where fathers are challenging Mother’s unilateral decision to move.

Father contends that Mother has denied him access to the children by refusing to take his telephone calls. Mother denies this, claiming that Father has called on only a few occasions. Neither side presented persuasive evidence concerning whether Father has been denied access to the children or whether he has simply not made a reasonable effort.

The Court was not presented any evidence indicating that either parent intentionally misled the Court to cause unnecessary delay to increase the cost of litigation, or to persuade the Court to give a legal decision-making or parenting time preference. The Court notes, however, that Father was ordered to drug test, and that he failed to do so.

Neither parent reported any domestic violence or child abuse. At the Parenting Conference, the parents reported heated verbal arguments and reported that police had been called to their home as a result of the alleged arguments. These reports were not provided to corroborate, and these instances occurred years ago.

There was no agreement reached concerning parenting time. The parents have not provided the Court with information that they completed the Parent Information Program. No evidence was presented indicating that either of the parents has been convicted of an act of false reporting of child abuse or neglect.

Mother claims that Father abuses methamphetamine. According to the Parenting Conference Provider, Father was convicted of driving under the influence in 2001 and 2003. Father claimed he has a valid driver’s license. As previously noted, the Court ordered Father to perform a hair follicle test and provide random UAs. Father failed to do either. The Court determines that Father’s failure to test is a positive result. Nevertheless, the Court finds that substance abuse does not prevent Father from exercising joint legal decision-making, but the substance abuse causes the Court to question Father’s judgment, so the Court will award presumptive decision-making to Mother.

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THE COURT FINDS that, based on the foregoing, it is in the children's best interests that Mother and Father be awarded joint legal decision-making authority regarding the children.

IT IS THEREFORE ORDERED awarding Mother and Father joint legal decision-making authority regarding the children, with Mother to have presumptive decision-making authority in the event of a dispute.

"Joint legal decision-making" means both parents share decision-making and neither parent's rights nor responsibilities are superior except with respect to specified decisions set forth herein. Shared or joint legal decision-making authority does not necessarily mean equal parenting time. If the parties cannot agree after making a good faith effort to reach an agreement, Mother shall have "presumptive decision making authority." This level of authority shall allow Mother the right to make a preliminary decision that she shall then communicate to Father. If Father believes that Mother's decision is contrary to the best interests of the children, he shall have the right to seek review through the Court. Father shall have the burden to demonstrate that Mother's decision is contrary to the children's best interests. It shall not be sufficient to demonstrate that an alternative decision may have also been in the interest of the children.

B. Relocation

As previously noted, relocation is typically controlled by A.R.S. § 25 – 408. However, in this case, A.R.S. § 408 does not specifically apply. The Court will nevertheless analyze the 408 factors in analyzing the children's best interests.

Under 408 (H), the first factor is whether the relocation was being made or opposed in good faith and not to interfere with or to frustrate the relationship between the child and the other parent or the other parent's right of access to the child. Here, the Court believes that both parties are acting in good faith. Mother moved to North Carolina with her fiancé (who is in the Marines) and her other children. Given that she has an infant with her Marine boyfriend, the Court believes that Mother moved to be with her infant's father, not to frustrate Father's parenting time. Similarly, the Court finds that Father was acting in good faith. He clearly cares for the children and is devastated to see them removed from his life.

The second factor is the prospective advantage of the move for improving the general quality of life for the custodial parent or for the child. Here, the advantage of North Carolina is that the Court has significantly fewer concerns about living arrangements in North Carolina than in Arizona. Mother demonstrated to the Court's satisfaction that living permanently with Father

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would not be in the children's best interests. Father's lifestyle is too unstable. He has had periods of unemployment. Although he is currently employed, he owes a large amount of back child support. He currently lives at home with his parents. He failed to drug test and therefore did not demonstrate to the Court that he is free of drug use. Although Father certainly expresses a desire to parent his children, the Court does not believe he has demonstrated sustained stability. On the other hand, Mother has been the primary residential parent since the children have been born. The Court finds that this factor cuts heavily in Mother's favor.

The third factor is the likelihood that the parent with whom the child will reside after relocation will comply with parenting time orders. The Court has concerns with this factor. Mother and Father agree that Father has had no contact with the children since May. The reason for this is in dispute. Father alleges that Mother has prevented his contact with the children and has refused to bring the children to Arizona. Mother claims that Father has not made sufficient efforts to speak with the children. Neither party presented any documentary evidence to support their positions.

The Court finds that both parties are at fault. The Court finds that Father has made insufficient efforts to contact the children. In fact, at the temporary orders hearing, the Court ruled as follows: "the Court finds Father's efforts to contact his children altogether inadequate." As far as the Court can tell, he has taken no steps since that time to better his contact with the children. Father has not initiated a Skype account. He has not gone to North Carolina to visit. At the last hearing, the Court offered Father this option by ordering "that Father may visit the children in North Carolina upon two weeks notice to Mother. The parties will split the costs of Father's travel, subject to possible reallocation in subsequent proceedings." Minute entry at page 4.

On the other hand, the Court finds that Mother has affirmatively resisted Father's efforts to contact the children. Her excuse was that the children do not want to speak with Father. As noted in Court, this is no excuse. Mother must make certain that Father's parenting time is properly exercised in the future.

On the whole, however, the Court finds that Father's efforts to maintain a relationship with the children have been insufficient, and Father is primarily to blame.

The fourth factor is whether relocation will allow a realistic opportunity for parenting time with each parent. Here, the move to North Carolina will, without question, substantially inhibit Father's ability to have parenting time. Yet Mother has always been the primary residential parent, and the Court believes this situation should continue.

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The fifth factor is how the move will affect the emotional, physical or developmental needs of the children. Here, the Court finds that the children will be better off in North Carolina. They will be with their Mother, who has been the primary residential parent throughout their lives. They will be with their half siblings, and they are in a school environment in which they are doing well. The Court does not believe that yanking the children from school in mid-year would be in their best interest.

The sixth factor involves the motives of the parents and the validity of the reasons given for moving or opposing the move. The Court sees no evidence against either parent on this factor. The Court finds that Mother's move was motivated by her desire to be with the father of her infant child. The Court finds that Father was motivated by his genuine love of his children.

The seventh factor is the potential effect of relocation on the children's stability. Here, the Court finds that relocation would result in the most stability for the children. Father has never been the primary residential parent; moreover, his unstable lifestyle and the Court's concerns about substance abuse indicate that stability would remain a concern. This is a major factor in the Court's mind.

THE COURT FINDS that, given all the factors noted above, moving to North Carolina is in the children's best interests.

IT IS THEREFORE ORDERED granting Mother's request to have the children live with her North Carolina.

C. Parenting Time

Mother and Father share joint legal decision-making. "Shared legal decision-making does not necessarily mean equal parenting time." A.R.S. § 25 – 403.02(E). The following parenting plan is practical and also maximizes each parent's parenting time to the extent it is in the child's best interests.

IT IS THEREFORE ORDERED that parenting time shall be exercised as follows:

Mother is the primary residential parent.

Father shall have one week of parenting time over Christmas vacation. The parties will split the costs of the children's transportation to Arizona and their return to North Carolina.

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Mother will be responsible for the costs of a chaperone.

Father shall have one week of parenting time over the children's spring break. The parties will split the costs of the children's transportation from Arizona and their return to North Carolina.

During the summer, Father shall have eight weeks of parenting time every summer commencing at a mutually agreed-upon date. The parties will split the costs of the children's transportation to Arizona and return to North Carolina. If the parties cannot agree, Father shall select the eight weeks in even-numbered years and Mother shall select the eight weeks in odd-numbered years.

Father is to get an email account, Skype or some other electronic contact. Each parent shall have reasonable telephone or other electronic contact with the children when the children are in the care of the other parent. If Father wishes to have Skype contact, Mother shall install Skype in North Carolina, at her own expense.

Father may visit the children in North Carolina upon mutual agreement, such agreement not to be unreasonably withheld. The parties will split the costs of Father's travel 50-50.

Father shall complete the hair follicle test and UAs previously ordered. Such results are to be furnished to the Court and Mother.

If Father tests positive, fails to test or fails to provide the test results, all of the aforementioned parenting orders are vacated and Father will have no unsupervised parenting time without Court order.

In furtherance of the children's best interests, the parents shall use email as their primary method for communication. This method allows the parents to develop their communication and ensures both accountability and verifiability. Both parties shall maintain and regularly review their email accounts. They shall each respond in a timely fashion, even if such response is merely to acknowledge the receipt of information. Each should print copies of all emails received and sent, so that if an issue arises in the future that has been addressed through email, each party shall have proof as to what was communicated. Each parent is directed to print each email and store it in a binder or other filing system. This will serve as a "record" for critical, non-emergency communication.

In all communication including emails, Mother and Father shall be respectful in their tone

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and shall not use any profanities or expletives. All communication between the parents shall be reasonable and appropriate in all regards.

Neither parent shall talk about the case in front of or with any of the children. Neither parent shall use disrespectful, demeaning or pejorative language about the other parent (directly or indirectly) when any of the children can hear, read or otherwise perceive such statements, nor shall any parent allow the children to be physically or electronically at a location where any child can hear, read or perceive such statements made by a third party.

Each parent shall have reasonable telephone or other electronic contact with the children when the children are in the care of the other parent. As noted at the hearing, unless the parents agree otherwise, Father shall have telephonic contact with the children at least three days a week on Tuesday and Thursday between 6:30 p.m. and 7:00 p.m. (North Carolina time) and on Sundays at noon (North Carolina time).

D. Child Support

This is a IV-D case. As a result, this matter is referred to IV-D Court for future proceedings.

IT IS FURTHER ORDERED signing this Minute Entry as a formal written order of the Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

/s/ HONORABLE Roger E. Brodman

HONORABLE ROGER E. BRODMAN
JUDGE OF THE SUPERIOR COURT

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.